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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARIZONANS FOR OFFICIAL ENGLISH, *et al.*,
Petitioners,

v.

STATE OF ARIZONA,
MARIA-KELLEY YNIGUEZ, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES REPRESENTATIVE NYDIA M. VELAZQUEZ, CONGRESSIONAL HISPANIC CAUCUS, CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS AND 32 INDIVIDUAL MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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ADDITIONAL *AMICI CURIAE* LISTED INSIDE *FRONT COVER*

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ADDITIONAL *AMICI CURIAE*
(Continued from front cover)

UNITED STATES SENATORS EDWARD M. KENNEDY, CAROL MOSELEY-BRAUN AND PAUL SIMON, UNITED STATES REPRESENTATIVES HOWARD L. BERMAN, JAMES E. CLYBURN, RONALD D. COLEMAN, JOHN CONYERS, JR., RONALD V. DELLUMS, JULIAN C. DIXON, SAM FARR, CHAKA FATTAH, FLOYD H. FLAKE, VICTOR O. FRAZER, ALCEE L. HASTINGS, JESSE JACKSON, JR., MATTHEW G. MARTINEZ, JIM MCDERMOTT, CYNTHIA MCKINNEY, CARRIE MEEK, JERROLD NADLER, ELEANOR HOLMES NORTON, JOHN W. OLVER, MAJOR R. OWENS, DONALD M. PAYNE, CHARLES B. RANGEL, PATRICIA SCHROEDER, LOUISE M. SLAUGHTER, PETE STARK, EDOLPHUS TOWNS, MAXINE WATERS, MELVIN L. WATT, AND ALBERT R. WYNN AND NEW MEXICO STATE REPRESENTATIVE E. SHIRLEY BACA

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INTEREST OF *AMICI CURIAE*

Amici are two Caucuses of the United States Congress, one national organization of state and local elected and appointed officials, 32 individual United States Senators and Representatives not affiliated with the Caucuses,

and one state legislator from New Mexico who is currently campaigning for the United States Congress. Together, these *amici* represent over 42 million people in this country, including over 2.9 million people who are not proficient in English or who do not speak English at all.

Amici are interested in and directly affected by this case for two reasons. First, a provision such as Article XXVIII of the Arizona Constitution ("Article XXVIII") would substantially impede the ability of legislators to communicate with -- and thereby represent -- their constituents who are not proficient in English. Second, because a number of "official English" provisions are currently pending in Congress, *amici* wish this Court to be aware of the practical effect of such provisions on legislators before it rules on their constitutionality. The purpose of this brief, therefore, is to demonstrate that practical effect and to show why that effect violates the First Amendment rights of elected representatives in this country.

The Congressional Hispanic Caucus ("CHC") is an informal bipartisan group of 18 Members of Congress of Hispanic descent. CHC is dedicated to voicing and advancing, through the legislative process, issues affecting Hispanic Americans in the United States and the insular areas. Founded in 1976 as a legislative service organization of the United States House of Representatives, CHC is now organized as a congressional member organization, governed under the Rules of Congress. The following CHC member United States Representatives join as *amici*: Nydia M. Velázquez (12th Dist., New York), Xavier Becerra (30th Dist., California), Lincoln Diaz-Balart (21st Dist., Florida), E (Kika) de la Garza (15th Dist., Texas), Henry B. Gonzalez (20th Dist., Texas), Luis V. Gutierrez (4th Dist., Illinois), Robert Menéndez (13th Dist., New Jersey), Solomon P. Ortiz (27th Dist., Texas), Ed Pastor (2nd Dist., Arizona), Bill Richardson (3rd Dist., New Mexico), Carlos Romero-Barceló (Puerto Rico), Ileana

Ros-Lehtinen (18th Dist., Florida), Lucille Roybal-Allard (33rd Dist., California), José E. Serrano (16th Dist., New York), Frank Tejeda (28th Dist., Texas), Esteban E. Torres (34th Dist., California), and Robert Underwood (Guam).

The Congressional Asian Pacific American Caucus ("CAPAC") is a group of ten members of Congress which was founded in 1994 to increase and enhance the ability of Members of Congress and their allies to represent effectively the Asian American and Pacific Islander community's concerns in policy debates. The following members of CAPAC join as *amici*: United States Senators Daniel K. Akaka (Hawaii) and Daniel K. Inouye (Hawaii) and United States Representatives Neil Abercrombie (1st Dist., Hawaii), Eni F.H. Faleomavaega (Samoa), Robert T. Matsui (5th Dist., California), Patsy T. Mink (2nd Dist., Hawaii), Nancy Pelosi (8th Dist., California), and Robert Underwood (Guam).

The National Association of Latino Elected and Appointed Officials ("NALEO") is a non-partisan, national organization which seeks to advance the health, social, economic, and educational welfare of Americans of Hispanic origin or descent. NALEO provides information and assistance on legislative and governmental actions affecting Hispanics and other disadvantaged groups. The membership of NALEO is open to all individuals committed to the objectives of the organization. NALEO has approximately 300 members, including Members of Congress and elected and appointed state and local officials. Several members of CHC are also members of NALEO.

The following members of the United States Congress who are not members of either CHC or CAPAC but share concerns about the constitutionality of Article XXVIII also join this brief as *amici*: Senators Edward M. Kennedy (Massachusetts), Carol Moseley-Braun (Illinois) and Paul Simon (Illinois), and Representatives Howard L. Berman (26th Dist., California), James E. Clyburn (6th Dist., South Carolina), Ronald D. Coleman

(16th Dist., Texas), John Conyers, Jr. (14th Dist., Michigan), Ronald V. Dellums (9th Dist., California), Julian C. Dixon (32nd Dist., California), Sam Farr (17th Dist., California), Chaka Fattah (2nd Dist., Pennsylvania), Floyd H. Flake (6th Dist., New York), Victor O. Frazer (Virgin Islands), Alcee L. Hastings (23rd Dist., Florida), Jesse Jackson, Jr. (2nd Dist., Illinois), Matthew G. Martinez (31st Dist., California), Jim McDermott (7th Dist., Washington), Cynthia McKinney (11th Dist., Georgia), Carrie Meek (17th Dist., Florida), Jerrold Nadler (8th Dist., New York), Eleanor Holmes Norton (District of Columbia), John W. Olver (1st Dist., Massachusetts), Major R. Owens (11th Dist., New York), Donald M. Payne (10th Dist., New Jersey), Charles B. Rangel (15th Dist., New York), Patricia Schroeder (1st Dist., Colorado), Louise M. Slaughter (28th Dist., New York), Pete Stark (13th Dist., California), Edolphus Towns (10th Dist., New York), Maxine Waters (35th Dist., California), Melvn L. Watt, (12th Dist., North Carolina), and Albert R. Wynn (4th Dist., Maryland). In total, 56 Members of Congress join this brief as *amici*. In addition, New Mexico State Representative E. Shirley Baca, who is currently campaigning for the United States Congress, also joins as *amicus*.

All parties have consented to the participation of *amici*, and consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Article XXVIII is unlike provisions of other state laws that merely proclaim English to be the state's "official" language. Instead, the broad terms of Article XXVIII place a prohibition on governmental communications in any language other than English, a prohibition that, as the Ninth Circuit held, includes communications between elected officials and their constituents.

Amici, who are legislators and other elected officials, communicate every day with countless of their constituents in languages other than English. If *amici* were limited to speaking in English only, they would be unable to represent effectively the *entirety* of their constituencies because many of their constituents are not proficient in English. Communications with constituents by *amici* Members of Congress, many of whom were members of state legislatures before joining the Congress, vividly illustrate the types of communications that a provision like Article XXVIII would prohibit if it were allowed to stand. These communications, conducted personally by *amici*, and through staff, are necessary for legislative fact finding and to inform *amici*'s political debate; for providing necessary services to constituents; and for communicating with the electorate during political campaigns. Article XXVIII would shut off all of these communications and leave legislators without information necessary to represent non-English speaking portions of their constituencies, and leave these constituents without vital information about the business of our government.

Such a result plainly violates the First Amendment. Free speech between legislators and their constituents is central to our democratic system, and is entitled to the greatest measure of protection under our Constitution. As this Court has held, the state simply has no interest in limiting the capacity of a legislator to discuss matters of public policy with his constituents. *Bond* v. *Floyd*, 385 U.S. 116 (1966). Yet this is precisely what Article XXVIII does by prohibiting legislators from communicating with their constituents in languages other than English. In addition, Article XXVIII violates the First Amendment rights of legislators by limiting their capacity to discuss issues of public policy with their constituents as they relate to election campaigns -- political speech that is also entitled to the greatest protection under the First Amendment.

Article XXVIII is also contrary to the historical backdrop of the First Amendment and the Fourteenth Amendment, both of which were enacted against our historical tradition of governmental actors communicating with their constituents in languages other than English. Our long history of legislators speaking with their constituents in languages other than English also belies the arguments made by Petitioners and their *amici* that our democracy is threatened by allowing legislators who wish to do so to communicate with their constituents in languages other than English.

Amici believe that all people in this country should be encouraged to learn English so that they may participate to the fullest extent in our national political life. *Amici* also believe that non-English-speaking Americans have vital contributions to make to our political discourse, and should not be prevented from participating in our government while they work to become fluent in English. Petitioners present no cogent reason, much less a compelling one, why those who do not speak English, who are citizens and tax payers, should be prevented from participating in the political process and shut off from communicating with the legislators whom they elected to represent their interests. Article XXVIII's prohibition on such communications violates the First Amendment and should not be allowed to stand.

ARGUMENT

I. ARTICLE XXVIII VIOLATES THE FIRST AMENDMENT RIGHTS OF LEGISLATORS BY INHIBITING THEIR ABILITY TO COMMUNICATE WITH THEIR CONSTITUENTS IN LANGUAGES OTHER THAN ENGLISH

By prohibiting all government officials and employees from using any language other than English when communicating with the people they serve, Article XXVIII is more restrictive than any other "official

English" provision in existence in our country. As the Ninth Circuit expressly held, Article XXVIII even limits communications between legislators and their constituents. The experience of *amici*, as shown below, illustrates the numerous kinds of communications between legislators and their constituents that would be inhibited by Article XXVIII. Such inhibitions on speech, as also shown below, plainly violate the First Amendment.

A. The Broad Terms of Article XXVIII Limit Speech by Legislators to Their Constituents

Even to those who might otherwise favor adoption of English as an "official language," the breadth of Article XXVIII is, quite simply, astounding.[1] Section 1 of Article XXVIII declares English to be the "official language of . . . all government and actions," and states

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[1] By providing that all governmental communications may be in English only, Article XXVIII is uniquely restrictive when compared to other state provisions establishing English as the state's "official language." Indeed, the official English provisions of four states expressly allow governmental communications in languages other than English. *See* 1995 Mont. Laws 319; Va. Code Ann. §7.1-42; 1996 Wyo. Sess. Laws 34; *Puerto Rican Org. for Political Action* v. *Kusper*, 490 F.2d 575 (7th Cir. 1973) (interpreting Illinois' "official-English" statute).

Thirteen other states have either passed legislation or amended their constitutions to establish English as their official language, without any further elaboration. *See* Ala. Const. amend. 509; Ark. Code Ann. § 1-4-117 (Michie 1987); Cal. Const. art. III, § 6; Colo. Const. art. II, § 30a; Fla. Const. art. II, § 9; 1986 Ga. Laws 529; Haw. Const. art. XV, § 4; Ind. Code Ann. § 1-2-10-1 (West 1996); Ky. Rev. Stat. Ann. § 2.013 (Baldwin 1996); Miss. Code Ann. § 3-3-31 (1993); Neb. Const. art. I, § 27; N.C. Gen. Stat. § 145-12; N.D. Cent. Code § 54-02-13. The essentially symbolic nature of many of these laws (Arkansas, Hawaii, Indiana, Kentucky, Mississippi, North Carolina, North Dakota, South Carolina (S.C. Code Ann. § 1-1-696 (Law Co-op 1993)) and South Dakota (S.D. Codified Laws Ann. § 1-27-20 (1996))) is emphasized by their placement in sections of their respective state codes relating to other symbols such as the state bird, song, or motto.

that Article XXVIII applies to "the legislative, executive and judicial branches of government," and to "all government officials . . . during the performance of government business." Article XXVIII, § 1. Section 3 of Article XXVIII then provides that (with certain exceptions not here relevant) "[t]his State . . . shall act in English and no other language." Article XXVIII, § 3(1)(a). As the Ninth Circuit held, Article XXVIII's "plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties . . . ." *Yniguez* v. *Arizonans for Official English*, 69 F.3d 920, 931 (9th Cir. 1995) (en banc). And as the Ninth Circuit also held, the broad terms of Article XXVIII clearly encompass non-English speech by legislators in the course of performing their duties as representatives of the people. *Id.* at 932 ("Article XXVIII on its face applies to speech in a seemingly limitless variety of governmental settings [including] town-hall discussions between constituents and their representatives").

Accordingly, Petitioners' *amici*, the Washington Legal Foundation, *et al.* ("WLF"), are wrong to contend that Article XXVIII applies only to the "legislative function" of legislators, and does not affect speech between legislators and their constituents. *See* Brief of the Washington Legal Foundation, *et al.* as *Amici Curiae* in Support of Petitioners ("WLF Brief") at 7. Certainly, nothing in the language of Article XXVIII or the Ninth Circuit's construction of it supports that view. [2] In fact,

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[2] This Court generally defers to interpretations of state law made by the courts of appeals. *See Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988); *Pembauer* v. *City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). This is especially true where, as here, the district court and the court of appeals agree on the proper interpretation of state law. *See Bishop* v. *Wood*, 426 U.S. 341, 346 (1976) ("this Court has accepted an interpretation of state law in which the District Court and Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").

the only authorities WLF cites in support of the purported limitation of Article XXVIII to "legislative acts" address the entirely different issue of the reach of the Speech or Debate Clause in the United States Constitution and the analogous provision of the Arizona Constitution. *See, e.g., United States* v. *Brewster*, 408 U.S. 501 (1972); *Gravel* v. *United States*, 408 U.S. 606 (1972). Using this inapposite body of law, WLF concludes first that Article XXVIII, as applied to legislators, reaches only speech on the floor of the legislative chamber and in legislative committees, and then concludes that a prohibition on non-English speech within that sphere raises no difficulty under the First Amendment. WLF Brief at 8-10. But, if Article XXVIII were intended to reach no farther than speech used on the floor of the legislative chamber and in committee hearings -- which is certainly not what the language of Article XXVIII states -- the provision would apply *only* to speech that *may not be regulated* under the Arizona equivalent of the federal Speech or Debate Clause. *See* Ariz. Const. art. 4, § 7 ("No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate."). This would make the provision nonsense for it would then have no effective application to legislators at all. [3]

Thus, contrary to WLF's view, Article XXVIII limits non-English speech that is engaged in every day by legislators and their staff members with constituents concerning public policy and the daily workings of government. Article XXVIII furthermore presents a real and substantial chilling effect on speech by legislators to their constituents in the course of an election campaign, or that is arguably part of an election campaign. While *amici* recognize that one could argue that speech made in an election campaign is not covered by Article

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[3] *See United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such a fashion that every word has some operative effect") (citations omitted).

XXVIII because it is not "government business," such an argument assumes that a clear line can be drawn between "campaign" speech by a legislator and "non-campaign" speech. Of course, such line drawing is not possible. Most Members of Congress are constantly running for re-election, and are also constantly serving and communicating with their constituents. Such legislators should not be left to guess whether a given speech or constituent communication will be deemed "campaign" or "non-campaign" speech, since most of what they do serves both purposes.[4] And yet, as illustrated below, many elected representatives could not serve either purpose effectively if they could not freely speak in languages other than English.

B. The Recurring Non-English Communications Between *Amici* and Their Constituents Demonstrate the Harm Article XXVIII Would Cause to Legislators and to the Democratic Process

As legislators and elected officials, *amici* communicate every day with countless of their constituents. Many of *amici*'s constituents do not speak English well or do not speak English at all. Consequently, many of these communications by *amici* and their staff members are in a language other than English. Indeed, some *amici* would find it impossible to fairly represent substantial portions of their constituencies at all if they were required to communicate only in English when performing government business.

Amici find it necessary to communicate, both orally and in writing, with their constituents in a variety of languages in order to consider proposed legislation and to conduct legislative fact finding; to provide

[4] Of course, because Article XXVIII applies only to government employees and officials, a private person running for office against an incumbent legislator would not be under the same restrictions in campaigning and could freely address the electorate in the language of his or her choice.

information and services to constituents; and to inform the electorate for purposes of running for re-election. Many *amici* Members of Congress were formerly members of state legislative bodies, and their interactions with constituents in the United States Congress mirrors those in which they engaged as state legislators. Some examples of these non-English communications show both the breadth of these communications and their importance to *amici*'s ability to represent their constituents.

Representative Ileana Ros-Lehtinen, a CHC member who previously served in both houses of the Florida legislature, currently represents the 18th District in Florida, which includes part of the Miami area. Her experience in a district where 26.6 percent of the population is not proficient in English[5] provides a good example of the range of a legislator's communications that could be chilled or prohibited by a provision like Article XXVIII. First, Spanish is the primary language of many of the community meetings Congresswoman Ros-Lehtinen attends to inform her constituents about her activities in Congress and to gain information from them necessary to represent their views. Second, Congresswoman Ros-Lehtinen relies heavily on Spanish language media to communicate her views to her constituents. Finally, every day the staff members in the Congresswoman's district office speak Spanish with constituents who are not proficient in English. A substantial amount of this work relates to providing information about visa and citizenship issues -- information which many constituents of the 18th District

[5] 1990 U.S. Census Data, *Age By Language Spoken at Home and Ability to Speak English*, 1990 Census Lookup (C905STF3D Database) 835278401 [hereinafter *Ability to Speak English*]. In the 1990 Census, people were asked to categorize themselves as speaking English "very well," speaking English "well," or speaking English "not well or not at all." *Id.* For purposes of this brief, people who identified themselves as speaking English "not well or not at all" are described as not proficient in English.

would simply do without if the Congresswoman's staff were prohibited from speaking Spanish.

Representative Ed Pastor, Chairman of the CHC, represents the 2nd Congressional District of Arizona, where 9.3 percent of the population is not proficient in English.[6] Through the staff members in his district office, Congressman Pastor communicates daily in Spanish with his constituents and also frequently conducts citizenship drives in the Tucson and Phoenix areas which would not be possible if the Congressman's staff were required to speak in English only.

Representative Robert Underwood of Guam, a member of both CHC and CAPAC, is fluent in both English and Chamorro (the native language of Guam) and frequently holds meetings with his constituents that are conducted in both languages. If Congressman Underwood were prohibited from communicating with his constituents in Chamorro, he would be unable to discuss his activities in Congress with large portions of his constituency. Congressman Underwood also relies on the use of both Chamorro and Tagalog in campaigning for re-election.

Congressman Xavier Becerra, a CHC member, frequently uses Spanish to communicate with his constituents in the 30th District of California, where 27.6 percent of the population is not proficient in English.[7] Earlier this year, Congressman Becerra participated in a congressional forum that was convened to investigate a widely publicized incident involving California law enforcement officers who used excessive force after apprehending 21 Hispanics in Riverside. The Congressman communicated the findings of the forum in Spanish to the Spanish language media and to non-English speaking constituents who had expressed fear for their safety.

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6 *Id.* at 835215600.

7 *Id.* at 835277674.

Representative Neil Abercrombie, a member of CAPAC, represents the First District of Hawaii, a district in which 5.6 percent of the population is not proficient in English.[8] Members of Congressman Abercrombie's staff speak with constituents on a daily basis in Tagalog, Ilocano, Hawaiian, and Japanese, as well as English. Congressman Abercrombie is regularly interviewed in Japanese on a Japanese-language radio station and places campaign advertisements in newspapers in Japanese and Tagalog.

Representative Ronald D. Coleman represents the 16th Congressional District of Texas, which includes El Paso and the surrounding area, where 14.3 percent of the residents are not proficient in English.[9] Congressman Coleman employs bilingual staff members both in Washington and in his district offices because approximately 25 percent of the casework inquiries to his office are made in Spanish.[10] Congressman Coleman provides much of his office literature and newsletters in both English and Spanish. In addition, Congressman Coleman has recruited witnesses for congressional committee hearings who do not speak English, and it is necessary for him to provide translations of their testimony to the committee. Congressman Coleman also relies on Spanish language

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8 *Id.* at 835279229. Before being elected to the United States Congress, Congressman Abercrombie served for a total of 12 years in the Hawaii House of Representatives and the Hawaii Senate.

9 *Id.* at 835279402. Congressman Coleman was a member of the Texas legislature from 1973 until 1982.

10 Some specific examples of assistance provided in Spanish by Congressman Coleman's office include work to ensure that the proper assistance was provided through the Federal Emergency Management Agency to the residents of a small town that was devastated by a tornado, and the recruiting of Hispanic students to apply for our nation's military service academies. The parents of many of these students do not speak English and rely on Congressman Coleman's staff to explain the application process.

media to communicate with his constituents and to campaign for re-election.

Congressman Carlos Romero-Barceló, a member of CHC, represents Puerto Rico where the official languages are English and Spanish. Most of Congressman Romero-Barceló's communications with his constituents are in Spanish, and the majority of the Congressman's staff are bilingual in Spanish and English. Press releases from the Congressman's office are usually in Spanish because Spanish-language media dominate the Puerto Rican market. Congressman Romero-Barceló also speaks Spanish with an overwhelming majority of his constituency in campaigning for re-election.

Representative Nydia M. Velázquez, a CHC member, represents the 12th District of New York where 24.4 percent of the population is not proficient in English. [11] The staff of Congresswoman Velázquez's district offices communicates with constituents in Spanish on a daily basis, and has translated several forms concerning applications for citizenship and Section 8 housing into Spanish to encourage constituents to complete the forms themselves, rather than relying on staff to ensure the forms are completed correctly. [12]

CHC member Congresswoman Lucille Roybal-Allard represents the 33rd District in California, where 31.6

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11 *Ability to Speak English* at 835278791.

12 Bilingual staff members in the Congresswoman's district office were able to prevent the wrongful eviction of one constituent, a young single mother, who was nearly evicted from Section 8 housing because she had failed to complete some paperwork from the government. The woman, who spoke only Spanish, had not completed the paperwork because she did not understand it and was afraid that to complete it incorrectly would jeopardize her housing. At the brink of an eviction proceeding, bilingual staff members in the Congresswoman's district office assisted the woman in completing the proper forms and allowed her to stay in her home.

percent of the population is not proficient in English. [13] Seven of the eight staff members in Congresswoman Roybal-Allard's district office speak both Spanish and English, and frequently use Spanish in responding to constituent requests, and in speaking with constituents at community meetings and school PTA meetings. The Congresswoman's newsletter is in both Spanish and English and she relies on Spanish in speaking with her constituents as part of campaigning for re-election.

Representative José Serrano, a CHC member, represents the 16th District of New York in the South Bronx, where 14.6 percent of the population is not proficient in English. [14] Congressman Serrano regularly relies on Spanish to discuss legislative policies with his constituents and to communicate with his constituents through the media because most of the local media, on which many of his constituents rely for their daily information, is in Spanish. Nine of the thirteen members of the Congressman's current staff are bilingual in Spanish and English. [15] In a single month, Congressman Serrano's district office receives as many as 500 calls for information on immigration matters from constituents who speak little or no English. If staff members were prohibited from communicating in Spanish, they would be unable to help these constituents gain work authorization, apply for citizenship, or bring family members into the United States as the law provides.

All of these activities constitute government business. All of them are at the core of what legislators do to make the democratic process work. And, as next shown, if they all were arbitrarily prohibited by a provision like Article XXVIII, the First Amendment rights of legislators plainly would be violated.

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13 *Ability to Speak English* at 835215821.

14 *Id.* at 835278711.

15 Congressman Serrano similarly relied on bilingual staff members when he previously served in the New York Assembly.

C. Article XXVIII Prohibits Speech By Legislators That is At the Core of Speech Protected by the First Amendment

The First Amendment's guarantee of uninhibited discussion on public issues [16] is nowhere more important than where that discussion is between legislators and those they are elected to serve. In fact, speech between elected representatives and those they represent is central to our democracy. *See, e.g., Doe* v. *McMillan*, 412 U.S. 306, 328 (1973) (Douglas, J., concurring) ("A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy."); *The Federalist No. 56*, at 346 (James Madison) (Clinton Rossiter ed., 1961) ("It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents."). Indeed, like the statute at issue in *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 64 U.S.L.W. 4663 (1996), the difficulty posed by Article XXVIII is "its stifling effect on the ability of [an elected representative] to do what [he] exists to do," namely, represent his constituents. *Id.* at 4670 (Kennedy, J., concurring in the judgment and dissenting in part).

Although this Court has never addressed the constitutionality of a provision like Article XXVIII, it has often considered the First Amendment protections afforded to speech by legislators and elected officials. A review of those precedents makes clear that Article XXVIII is unconstitutional.

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16 It is well settled that the "First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

In *Bond* v. *Floyd*, *supra*, this Court considered the First Amendment rights of state elected officials, and held that the Georgia legislature could not prevent Julian Bond from taking his seat as a member of the Georgia legislature based on political statements he had made. The Court held that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." 385 U.S. at 135-36. The Court rejected Georgia's argument that although a private individual could not be prohibited from making such statements, the state could demand a higher standard from its elected officials. *Id.* at 132-33. Such a requirement was unacceptable, the Court held, because the state had "no interest in limiting its legislators' capacity to discuss their views of local or national policy." *Id.* at 135 (footnote omitted). Article XXVIII would effectively impose such a limitation here.

Indeed, Petitioners do not dispute the Ninth Circuit's conclusion that Article XXVIII's sweeping prohibitions on non-English speech would most certainly violate the First Amendment if applied to ordinary citizens. *See Yniguez*, 69 F.3d at 937 ("A state cannot simply prohibit all persons within its borders from speaking in the tongue of their choice."); *see also Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) ("[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary [English] speech, but this cannot be coerced by methods which conflict with the Constitution"). Under *Bond*, a higher standard may not be applied to elected representatives. If it could, as this brief shows, those representatives could not do the job they were elected to do.

While the limitations on a legislator's day-to-day communications with his or her constituents is enough to invalidate a provision like Article XXVIII, as earlier noted this provision is unconstitutional for another reason: it prohibits communications by elected officials concerning elections, either their own re-election or the

election of others. This Court has repeatedly recognized that communications in the course of an election are central to our democracy. *See Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (per curiam) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy -- the political campaign."). As the Court noted in *Buckley* v. *Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam), "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." [17] Obviously, a legislator cannot speak "intelligently" to the electorate if he or she is forced to speak in a language that particular electorate does not understand.

Furthermore, Petitioners have plainly presented no compelling governmental interest that supports the limitation Article XXVIII places on core political speech. [18] In fact, as *Bond* holds, 385 U.S. at 135, the state has "no interest" at all in limiting legislators' very capacity to speak with their constituents.

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17 *See Eu* v. *San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989) ("Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)).

18 This Court's cases are clear that provisions like Article XXVIII that seek to limit speech in the course of an election campaign are subject to strict scrutiny under the First Amendment. *See Colorado Republican Federal Campaign Comm.*, 64 U.S.L.W. at 4666 (plurality opinion); *Brown* v. *Hartlage*, 456 U.S. at 53-54 ("When a state seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 & n. 11 (1978); *Buckley* v. *Valeo*, 424 U.S. at 44-45.

Nevertheless, Petitioners assert that Article XXVIII promotes the governmental interest in encouraging all citizens to learn English. Pet. Brief at 17-18. *Amici* support that interest. But they emphatically deny that that interest may be achieved by cutting off the First Amendment rights of legislators or cutting out a substantial part of the citizenry from participating in government. Such means are neither legitimate, nor narrowly tailored. Indeed, *amici*'s own experience shows that the best way to bring non-English-speakers into the "mainstream" is to involve them in the democratic process while they learn English, not shut them out of it until they are fluent. As this Court recently noted, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1508 (1996); *see Anderson* v. *Celebreeze*, 460 U.S. 780, 798 (1983) ("[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism").

Petitioners also argue that the state has a "substantial" interest in promoting "national unity." Pet. Brief at 36-37. But the case Petitioners cite in support of this interest held that "promoting national unity" did *not* provide a compelling state interest for criminalizing speech with which the state disagreed. *See Texas* v. *Johnson*, 491 U.S. 397, 418 (1989). In fact, when the sentence quoted by Petitioners is read in context, it becomes clear that the true issue in *Johnson*, as well as in this case, is the *means* employed by the state in reaching its goal of national unity. 491 U.S. at 418 ("National unity as an end which officials may foster by persuasion and example is not in question. *The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.")* (emphasis added) (quoting *Board of Educ.* v. *Barnette*,

319 U.S. 624, 640 (1943)); *see Meyer* v. *Nebraska*, 262 U.S. at 401.

Amici agree that encouraging citizens to speak English is a good thing; they also agree that encouraging "national unity" can be a good thing. But the *means* chosen by Arizona to promote these goals unnecessarily and unconstitutionally limit core First Amendment rights of legislators to serve and communicate with their constituents.

Amici also agree with Petitioner's *amici* WLF that "[p]olitics requires deliberation, and deliberation requires that those deliberating understand each other." WLF Brief at 23. But from this statement, WLF and Petitioners draw the wrong conclusion. A legislator who is required to speak only in English will simply not be understood by that portion of his or her constituency that does not speak English. *Amici* likewise agree with WLF that "in a democracy, where the people are sovereign, and government is not the preserve of a favored few, but the purview and responsibility of the people as a whole . . . the people *as a whole* must be able to deliberate amongst themselves, and to deliberate, they must be able to communicate." *Id.* (emphasis added). But a provision like Article XXVIII that prevents legislators from speaking languages other than English with their constituents ensures that the people *as a whole* will be unable to communicate with their elected officials and therefore will be unable to participate in the political process in the most direct way possible.

Finally, *amici* agree with WLF that "for this nation to work, we must *all* be able to discuss our political heritage, the foundations of our rights, the nature of our duties, together." *Id.* at 26 (emphasis added). This discussion is impossible, however, if those who do not speak English are unable to participate in the debate. The First and Fourteenth Amendments preserve the right of all people in our Nation, *including* those who do not speak English, to be able to participate fully in discussions with their representatives on matters of

public policy, and preserve the rights of legislators to freely discuss with *all* of their constituents the matters necessary to effectively represent those constituents in Congress and in the state legislatures. Because a provision such as Article XXVIII violates these rights, it cannot withstand constitutional scrutiny and should be invalidated by this Court.

II. THE LONG TRADITION OF NON-ENGLISH COMMUNICATIONS BETWEEN LEGISLATORS AND THEIR CONSTITUENTS CONFIRMS THE UNCONSTITUTIONALITY OF ARTICLE XXVIII

Although *amici*'s experience demonstrates the critical importance of legislators' ability to communicate freely with all their constituents -- even those who do not speak English -- *amici*'s experience is nothing new; government representatives have used languages other than English to communicate with their constituents since the very founding of our nation. This tradition of non-English communications by legislators provides the historical backdrop for the adoption of both the First and the Fourteenth Amendments, and shows that it was well understood by the legislators of these times that the practice of non-English communications by legislators was both necessary and appropriate to keep *all* the people informed about the workings of the government. [19]

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[19] In giving meaning to the terms of the First Amendment, this Court frequently informs its decisions with reference to the history of our nation at the time that the Constitution was adopted. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 10 (1986) (First Amendment right of access to preliminary hearings informed by "tradition of accessibility"); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984) (First Amendment right of access to voir dire supported by fact that "[p]ublic jury selection . . . was the common practice in America when the Constitution was adopted."); *Globe Newspaper Co.* v. *Superior Court*, 456 U.S. 596, 604-05 (1982). As Justice Scalia recently noted, historical evidence from the states at the time the Fourteenth Amendment was

These historical materials also belie the conclusory arguments by Petitioners and Petitioners' *amici* WLF that the essence of our democracy relies upon prohibiting the use of languages other than English. *See* Pet. Brief at 36-38. Instead, the long-standing and continuing tradition of our nation is to permit legislators to communicate in languages other than English with portions of their constituencies that do not understand English. This tradition confirms and underscores *amici*'s own experience that it is only through such communications, which are given the greatest First Amendment protection, that *amici* and other legislators may successfully represent *all* of their constituents in our democratic process.

A. The Continental Congress and Early State Legislatures Issued Official Documents in Languages Other Than English

The Continental Congress translated numerous of its official publications into German and French to communicate with non-English speaking inhabitants of the colonies. [20] During the Revolutionary War, the

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adopted is also important to the application of First Amendment principles to state laws. *See 44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. at 1515 (Scalia, J., concurring in part and concurring in the judgment) (relevant evidence provided by "the state legislative practices prevalent at the time the First Amendment was adopted . . . . [and] more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech.").

20 For example, in 1774, the Continental Congress made available a German translation of excerpts from its votes and deliberations and a few years later, it ordered a French translation of the "Rules and Articles for the Better Government of the Troops Raised." *See 1 Journals of the Continental Congress, 1774-1789*, 135 (Worthington Chauncey Ford, ed., 1905); 3 *id.* at 512. In 1776, the Continental Congress translated an address to the people of Ireland into German. 3 *id.* at 513-14. A December 10, 1776 circular letter of the constituents of the Continental Congress was printed and distributed in German. Heinz Kloss, *The American*

Continental Congress communicated in German to persuade German-speaking residents of the colonies to fight with them against the British. [21] After the Revolutionary War, the Articles of Confederation were published by the Continental Congress in both German and French. [22] The Articles of War were also translated into French in an effort to encourage Quebec to join the new nation. [23] And although Congress declined a 1794 request to print German editions of Congressional laws, [24] the new government continued communicating with the people in languages other than English. For example, four years later, President John Adams's message of April 7, 1798, dealing with orders to and

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Bilingual Tradition 26 (1977). In addition, the Continental Congress on January 16, 1777 authorized the printing, at its own expense, of 1,000 German copies of an address of the Convention of New York, *7 Journals of the Continental Congress, supra*, at 42 (1907), and also issued an address "To the People in General, and Particularly to the Inhabitants of Pennsylvania" in English and German. 6 *id.* at 1126 (1906).

21 On August 14, 1776, the Continental Congress ordered the translation into German of a resolution encouraging foreigners to desert the British army and become citizens of any state. *Journals of Congress*, Wednesday, August 14, 1776 (Library of Congress Constitutional Congress Broadsides Collection no. 12). In 1777, the Continental Congress authorized 2,000 copies of a report about the behavior of the enemy armies printed in German. Kloss, *The American Bilingual Tradition, supra*, at 26. The Continental Congress also printed in German a declaration of April 23, 1778, concerning the treatment of American citizens or immigrants who joined the American side in the Revolution. *Id.*

22 *9 Journals of the Continental Congress, supra*, at 1088 (1907).

23 3 *id.* at 512. *See also* Dennis Baron, *The English Only Question* 87 (1990).

24 *See* Kloss, *The American Bilingual Tradition, supra*, at 28-29; Baron, *The English Only Question, supra*, at 88 (outlining Congressional activity and debates on the petition); Klaus Wust, *The Virginia Germans* 114 (1969).

communications from American diplomats in France, was translated into German. [25]

States have a tradition even stronger than that of the federal government of official non-English communications with constituents. States with large German, French, and Spanish populations have often issued official documents and legislative materials in these languages. Such actions occurred in the original states and in lands acquired from Spain, France, and Mexico throughout the eighteenth and nineteenth centuries. [26]

B. The Framers of the Constitution Supported Political Discourse in Languages Other Than English

Although members of the Continental Congress recognized some of the same concerns raised by Petitioners today about the use of non-English languages, no attempt was made to prohibit non-English speech in the new nation. For example, during the Continental Congress, Benjamin Franklin expressed concern that the large German population would increasingly undermine Anglican dominance in Pennsylvania and he publicly complained of the increasing German influence in American society. [27]

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25 Kloss, *The American Bilingual Tradition, supra,* at 28.

26 *See id.*, at 112-15, 143-44, 189-90 (describing Louisiana laws translated into French and German, and Pennsylvania, Maryland and New York laws translated into German); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 317-18 (1992) (describing translation of California laws and legislative proceedings into Spanish); Wust, *The Virginia Germans, supra,* at 113-14 (describing Virginia laws translated into German in the 1700s).

27 *See* Baron, *The English Only Question, supra,* at 65-67; 2 Albert Bernhardt Faust, *The German Element in The United States* 152-55 (1927). In 1751, Franklin wrote to a friend of his fear that Pennsylvania would become a German colony, and criticized German-Americans for refusing to learn English. 4 Benjamin

Despite his concerns, Franklin did not attempt to limit the use of German in the new United States -- by government or by the people -- but instead published himself the first German newspaper in the United States, and also published German books. [28] In fact, Franklin opposed a proposal that would limit the printing and sale of German materials. [29]

Furthermore, Thomas Jefferson and other of the Founders strongly believed in the importance and cultivation of languages other than English. Jefferson, fluent in French, recognized the political advantage to be gained from studies of other languages, and his correspondence often commented on the importance to Americans of learning the French and Spanish languages. [30] Benjamin Rush, a signer of the Declaration of Independence, also publicly supported learning several languages. [31]

More importantly, not only did the Founders of the new nation fail to announce an official language, or to prohibit the speaking of languages other than English, they also rejected attempts to regulate "official" American English. In the 1780s, an effort to establish a national language academy to standardize American English failed, demonstrating the Founders' awareness of the lingual diversity of the new nation, and

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Franklin, *The Papers Of Benjamin Franklin* 120-21, 234 (Leonard W. Labaree, ed., 1961).

28 *See* generally, Oswald Seidensticker, *The First Century of German Printing in America 1728-1830* (1980) (listing German publications in America).

29 Baron, *The English Only Question, supra,* at 67.

30 *See* Perea, 77 Minn. L. Rev. at 289-90 (citing Thomas Jefferson, *Letter from Thomas Jefferson to Sir Herbert Croft* (Oct. 30, 1798), in *The Complete Jefferson* 855 n.1, 856 n.1 (Saul K. Padover, ed., 1943)).

31 *See* Perea, 77 Minn. L. Rev. at 290-92.

unwillingness to prohibit expression based on the language in which it occurred. [32]

None of this is to say that some form of an "official English" provision might not be debatable today. But it is to say that at the time of the First and Fourteenth Amendments' adoptions, the Framers of those Amendments certainly did not contemplate that they -- or any other legislator -- could be precluded from speaking whatever language they chose with those they represented.

C. Individual Legislators and Candidates Have Long Communicated With Constituents and Voters In Languages Other Than English

Not only was communication by the government in languages other than English accepted at the time the First and Fourteenth Amendments were adopted, but our country also has a long history of lawmakers, public officials, and candidates using languages other than English to address non-English speaking voters in their native language in order to gain their votes and ensure communication between the government and all of its constituents. [33] For example, in Virginia, German-speaking candidates for public office were routinely successful against non-German speakers in portions of the state just after the Revolutionary War. [34] Well into the nineteenth century, non-German speaking politicians throughout Virginia recognized the disadvantages they

32 *See id.* at 295-303.

33 *See* Baron, *The English Only Question, supra,* at 87.

34 Wust, *The Virginia Germans, supra,* at 113. These candidates from the Shenandoah Valley and southwestern portion of Virginia included Abraham Keller, elected to the House of Delegates from 1784-85; Jacob Rinker, elected to the 1788 Virginia convention ratifying the United States Constitution; Peter Kinder, elected to the House of Delegates in 1794; and John Koontz, the first German Republican elected to the House of Delegates in 1797. *Id.* at 113-14.

faced, and turned to German speaking allies or used handbills printed in German to further their campaigns. [35]

Further examples of non-English campaigning are provided by several prominent German-Americans who campaigned for themselves and on behalf of others in German in a number of states during the nineteenth century. One such man was Carl Schurz who campaigned in both German and English in the 1856 Presidential campaign for John Freemont, [36] and in Abraham Lincoln's 1858 United States Senate campaign against Stephen A. Douglas. [37] In the 1860 Presidential race, Schurz again campaigned for Lincoln, addressing meetings of German-born voters in German in a number of states. [38] Schurz himself was elected to the United States Senate from Missouri in 1869, becoming the first German-born citizen elected to that body. [39]

Another prominent German politician from Illinois named Gustave Koerner campaigned for several Democratic Congressmen during the same period as Schurz. Koerner campaigned for Senators Stephen A. Douglas and Lyman Trumbull and Congressman James Shields during the 1840s and 1850s. [40] From 1850 to

35 *Id.* at 115-17. For example, Congressman John Smith of Frederick, Virginia kept in constant touch with German church leaders, depending on them to speak on his behalf to non-English speaking Germans. *Id.* at 117. William Staige Marye, a member of the Virginia General Assembly from Page County, taught himself German to court the votes of the large number of non-English speaking Germans in his district. *Id.*

36 Allen Nevins, *Introduction* to Carl Schurz, *The Autobiography of Carl Schurz* at vii (Wayne Andrews, ed., 1961).

37 *Id.* at 138.

38 *Id.* at 164.

39 2 Albert Bernhardt Faust, *The German Element in The United States, supra,* at 158.

40 *See* Gustave Koerner, *Memoirs of Gustave Koerner 1809 - 1896* 425-28, 444-68 (Thomas J. McCormick, ed., 1909). Koerner

1860, Koerner campaigned in German for Abraham Lincoln throughout the midwest.[41] Koerner himself was elected to the Illinois legislature and continued to communicate to his German-American constituents in their native language.[42]

Again, this history is important not because it commands us today to continue the tradition of permitting discourse by public officials in whatever language they choose. Rather, that history is important because (1) it refutes Petitioners' unsupported contention that our democracy can work only if we exclude non-English speakers from it; and (2) it demonstrates that Petitioners' conception of the First Amendment -- that it would permit suppression of non-English speech by legislators -- was foreign to those who wrote that Amendment.

In summary, this Court's cases, the country's history, and *amici*'s experience all confirm a fundamental proposition: the First Amendment and our democratic process cannot function if legislators are prohibited from communicating with certain of their constituents. Article XXVIII should therefore be deemed unconstitutional.

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also gave speeches in German for various Illinois Democratic candidates throughout this period at all levels of government. *Id.* at 425-28.

41 *See* David Herbert Donald, *Lincoln* 242, 245, 249 (1995).

42 *See* Koerner, *Memoirs, supra*, at 468-90. For examples of other German-American politicians in the eighteenth and nineteenth centuries who often spoke in their native tongue to their constituents, *see* Faust, *The German Element in the United States, supra*, at 150-87.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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